Petition

81-868

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81 - No. 81-

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT DEVITO, DIRECTOR OF THE ILLINOIS DEPARTMENT OF MENTAL HEALTH,

PETITIONER,

VS.

GARY HARRINGTON, ALAN JOHNSON, A/K/A RENALDO WATSON, CHARLES DAVIS AND ROBERT JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, pursuant to 42 U.S.C. §1988, a co-defendant who furnished none of the relief secured by the plaintiff class upon the successful settlement of a 42 U.S.C. §1983 suit, can be compelled to bear a portion of the attorney's fees in the absence of any finding that any federal law was violated and in the absence of any admission of liability?

PARTIES

The following is a list of all parties involved in this litigation:

A. Petitioner:

1. Robert DeVito, Director of the Illinois Department of Mental Health.

B. Respondents:

1. Gary Harrington, Alan Johnson, a/k/a Renaldo Watson, Charles Davis and Robert Jones, Individually and on behalf of all others similarly situated;
2. George W. Dunne, President of the Cook County Board of Commissioners; Matthew W. Bieszczat, Mildred Casey, Frank W. Chesrow, Joseph Tecson, Carl K. Hansen, Irene C. Hernandez, Jerome Huppert, Ronald R. Larson, Mary M. McDonald, Matt Ropa, Ruby Ryan, John J. Stroger, Jr., Martin Tuchow, Harold Tyrrell, and Joseph I. Woods, Members of the Cook County Board of Commissioners;
3. Thomas Cooney, Dorothy Drish, Chester Nosal, Louis Ford, Arthur Waddy, Members of the Board of Cook County Department of Corrections;
4. Richard J. Elrod, Sheriff of Cook County;
5. Phillip T. Hardiman, Director of the Cook County Department of Corrections;
6. Charles W. Davis, Chairman of the Health and Hospitals Governing Commission of Cook County, and Mrs. W. Miles Burns, John W.B. Hadley, Felipe Ayala, Ellsworth E. Hasbrouck, Charles A. Davis, Sybille Fritzsche, Charles Hayes, George Hill, Dr. John Salet-

ta, Members of the Health and Hospitals Governing Commission of Cook County;[1]

7. James Houghton, Executive Director of the Cook County Governing Commission;[2]
8. Leonard Bersky, Director of the Cermak Hospital.

[1,2] The Health and Hospitals Governing Commission of Cook County was abolished in December, 1979, and its functions were transferred to the Cook County Board of Commissioners. The above named individuals were, however, parties to the Agreed Order.

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ROBERT DEVITO, DIRECTOR OF THE ILLINOIS DEPARTMENT OF MENTAL HEALTH,

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VS.

GARY HARRINGTON, ALAN JOHNSON, A/K/A RENALDO WATSON, CHARLES DAVIS AND ROBERT JONES, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *et al.*,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Robert DeVito, Director of the Illinois Department of Mental Health, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 10, 1981.

OPINIONS RENDERED IN LOWER COURTS

A. Consent Order, entered in the United States District Court for the Northern District of Illinois, Case No. 74 C 3290, October 19, 1978 — unpublished. (Appendix A)

B. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in Case No. 74 C 3290, awarding attorneys' fees on October 19, 1979 — unpublished. (Appendix B)

C. Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in Case No. 74 C 3290, apportioning attorneys' fees between State and County defendants on June 24, 1980 — unpublished. (Appendix C)

D. Opinion of the United States Court of Appeals for the Seventh Circuit, Docket Number 80-2070, issued August 10, 1981. Reported in 656 F. 2d 264 (7th Cir. 1981). (Appendix D)

E. Order of the United States Court of Appeals for the Seventh Circuit in Docket Number 80-2070 awarding attorneys' fees on appeal, issued September 23, 1981 — unpublished. (Appendix E)

JURISDICTIONAL GROUNDS

A. The United States Court of Appeals for the Seventh Circuit, on August 10, 1981, issued an opinion in the case Number 80-2070, affirming the District Court's award and allocation of attorneys' fees pursuant to 42 U.S.C. §1988. No Petition for Rehearing was filed.

B. The United States Court of Appeals for the Seventh Circuit, on September 23, 1981 awarded attorneys' fees on appeal.

C. 28 U.S.C. §1254(1) is the statutory provision conferring jurisdiction upon this Court.

STATUTORY PROVISION

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. §1988 (1980):

> Proceedings in vindication of civil rights
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act

of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

I. The Parties

Respondents, Gary Harrington, Alan Johnson, a/k/a Renaldo Watson, Charles Davis and Robert Jones filed a second amended complaint for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 in the United States District Court for the Northern District of Illinois on February 26, 1976. (R.91, App. p. 41a) The named individuals were pre-trial detainees confined to detention facilities of Cook County, Illinois, and were asserted to be in need of mental treatment. (R.91, pp.2-3, App. p. 43a) By that complaint, they claimed on behalf of themselves and all other pre-trial detainees in the custody of Cook County similarly situated, that the named defendants — all representatives of various distinct units of local government — violated the Fourteenth Amendment by denying adequate and necessary mental treatment to pre-trial detainees at Cook County facilities.

With one exception, all the named defendants were officers and agents of Cook County. The lone exception, Robert DeVito, is the Director of the State of Illinois Department of Mental Health [hereinafter "State Director"] and the instant petitioner. Presumably, Dr. DeVito was named a party defendant to the litigation because the complaint claimed that the State of Illinois, through its Department of Mental Health, together with the various named County officers were jointly and severally responsible for the denial of the alleged constitutional right to mental treatment for Cook County pre-trial detainees. The complaint sought a declaration that defendants' joint and several denial of adequate mental health care

violated the Fourteenth Amendment, sought to enjoin defendants to establish mental health treatment programs at County detention facilities, and prayed for compensatory and punitive damages. (R.91, p.17, App. pp. 54a-55a)

II. The Consent Decree

From the inception of this litigation to the present, the State Director insisted that he was an inappropriate defendant since, by statute, the State of Illinois had no jurisdiction or authority over conditions of incarceration at County detention facilities and individuals in the custody of the County. The State Director moved to dismiss the complaint on that basis, (R.15) but the motion to dismiss was never ruled upon.

In March, 1975, the United States District Court commenced a series of pre-trial conferences designed to improve the psychiatric care for the plaintiff class through the mutual efforts of the parties. In spite of a strong conviction that he was an inappropriate defendant, counsel for the State Director attended the conferences, participated in the negotiations and was instrumental in achieving substantial relief for the plaintiff class from the Cook County defendants. It was, indeed, the State Director's cooperation and input at the pre-trial conferences which made a successful settlement possible — a fact acknowledged by plaintiffs. (R.121, Ex.A&B)

The settlement was embodied in an Agreed Order entered October 19, 1978. (R.114, App. p. 2a) The Agreed Order contains no findings that any constitutional rights were violated nor any admissions of liability. The Agreed Order does require Cook County to inaugurate and maintain mental health screening and treatment programs for Cook County pre-trial detainees. The Agreed Order clearly and definitely placed the responsibility to inaugurate, operate and maintain these mental health programs on the Cook County defendants exclusively.

For instance, the Agreed Order required Cook County to hire and maintain a "mental health team" composed of psychiatrists, psychologists, psychiatric social workers, therapists, and mental health technicians. (R.114, p.13, App. p. 12a) The mental health team members were to screen pretrial detainees admitted to the County Department of Corrections to determine if they were in need of mental treatment. (R.114, p.5, App. p. 13a) When Such persons were found to be in need of mental treatment, the mental health team would determine the appropriate placement and treatment for those individuals. (R.114, p.13, App. p. 12a)

It was further agreed that various County facilities would be used exclusively as mental health treatment units. (R.114, pp.6,15 App. p. 6a) The County agreed to furnish office space, equipment, therapy rooms and furniture for the mental health team. (R.114, App. pp. 6a-7a) In addition, the County would train security personnel to identify persons in need of mental treatment. (R.114, pp.7-8, App. p.7a) The County would implement these programs, furnish these services, and maintain the mental health team with County funds impounded pursuant to a February, 1976 order of the United States District Court. (R.114, pp.10,17, App. p.9a) The Agreed Order, thus, placed the responsibility to implement and maintain these mental health programs and services on the County defendants alone.

The Agreed Order requires the State Director to file a monitoring report with the District Court concerning its distribution of grant-in-aid funds to the County; the Order, however, does not require the State Director to furnish any grant moneys. (R.114, p.22, App. p.21a) The State Director, by the terms of the Agreed Order, was not required to undertake or fulfill any obligations it had not met prior to the commencement of this lawsuit. The State of Illinois Department of Mental Health has not and does not now fund, supervise, administer or control any of the programs initiated through the Agreed Order.

III. Attorneys' Fees

In spite of the Agreed Order's recognition of Cook County's sole responsibility for initiating and upgrading psychiatric services for pre-trial detainees, and in spite of the Agreed Order's placement of the responsibility to furnish those services on the Cook County defendants, the District Court, nevertheless, concluded that the State Director and County defendants should share the liability for attorneys' fees pursuant to 42 U.S.C. §1988. The District Court, by order entered June 24, 1980 allocated a $25,000.00 award of attorneys' fees and directed that 80% or $20,000.00 should be borne by the County defendants, and 20% or $5,000.00 should be borne by the State Director. (R.136, App. pp. 27a-28a) It is impossible to know by what process the District Court arrived at this allocation, since the apportionment order contains no findings or criteria to explain the 80%-20% division.

This 80%-20% distribution was affirmed by the United States Court of Appeals for the Seventh Circuit in a published opinion issued August 10, 1981. [*Harrington v. DeVito*, 656 F. 2d 264 (7th Cir. 1981)]. The Seventh Circuit conceded that the limited obligations imposed upon the State Director by the Agreed Order overlapped somewhat with the State Director's existing duties under Illinois law. *Harrington, Id.* at p. 267. Nevertheless, the Seventh Circuit concluded that the class of pre-trial detainees were "prevailing parties" against the State Director within the meaning of 42 U.S.C. §1988, because the State Director took "certain steps to alleviate deficiencies in mental health treatment of pretrial detainees as a result of the plaintiffs' lawsuit." *Harrington, Id.*, at p. 267. The Court nowhere specified what "certain steps" were undertaken by the State Director, and nowhere outlined any change of position by the State Director as a result of plaintiffs' lawsuit. The Seventh Circuit's affirmance of the allocation appears to be based upon the State Director's mere status as a party defendant and mere presence and participation in

the settlement – a completely improper *per se* rule of liability for attorney's fees. Almost grudgingly the Court acknowledged that the State Director was in a difficult position – either cooperate in settlement discussions and bear attorney's fees or ignore the litigation completely. *Harrington, Id.* at p. 269.

IV. Summary

It is the State Director's position that an evaluation of whether plaintiffs are "prevailing parties" within the meaning of 42 U.S.C. §1988 in a multiple defendant/consent decree situation requires a meaningful inquiry into the roles, responses and remedial activities of each class of defendants. Congress did not intend that a *per se* rule of attorney's fees liability, such as the one adopted by the Seventh Circuit, would be invoked to determine "prevailing party" status. Accordingly, the State Director prays that the United States District Court's $5,000.00 award of attorneys' fees and the United States Court of Appeals' award of attorneys' fees be reversed.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS IMPROPERLY APPLIED A *PER SE* RULE TO SUSTAIN AN AWARD OF ATTORNEYS' FEES PURSUANT TO 42 U.S.C. §1988. THE STATE DIRECTOR'S PRESENCE IN THE LITIGATION AS A PARTY DEFENDANT AND PARTICIPATION TO ACHIEVE RELIEF FOR PLAINTIFFS FROM THE COUNTY CO-DEFENDANTS WAS, WITHOUT MORE, AN IMPERMISSIBLE BASIS UPON WHICH TO CONCLUDE THAT PLAINTIFFS WERE "PREVAILING PARTIES" AGAINST THE STATE DIRECTOR.

The action of the United States Court of Appeals in this case has produced a question which is one of first impression

before this Court. The issue resulting from the decision of the Seventh Circuit is by what criteria and by what standards attorney's fees pursuant to 42 U.S.C. §1988 should be allocated between defendants representing various separate and distinct units of local government. The importance of the issue is further underscored by the fact that, here, plaintiffs' claims pursuant to 42 U.S.C. §1983 were ultimately resolved through a consent decree which contained no findings that any constitutional rights had been violated and no admissions of liability. It is submitted that the Seventh Circuit's affirmance of an 80%-20% division of attorneys' fees between the County defendants and the State Director results from a failure to correctly evaluate the benefits secured by the plaintiff class against the remedies provided by the various defendants, and incorrectly adopts a *per se* rule of liability for attorneys' fees pursuant to Section 1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. §1988 (1980), provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The court's authority to award attorneys' fees to plaintiffs pursuant to the Fees Act depends on whether plaintiffs

"prevailed" against the defendant. The threshold inquiry, therefore, is whether plaintiffs are prevailing parties within the ambit of the Fees Act. Plaintiffs need not prevail on all contested issues in order to be considered prevailing parties, it is sufficient that plaintiff's lawsuit acted as a catalyst and produced substantial benefits for the named plaintiff and members of the class. U.S. Code Cong. & Adm. News, (1976), p.5912. In addition, neither formal judicial relief, nor a finding of illegal conduct on defendants' part, are preconditions to an award of attorneys' fees. An award may be appropriate where plaintiff had vindicated rights through a consent judgment. U.S. Code Cong. & Adm. News, (1976), p.5912; *Nadeau v. Helgemoe*, 581 F. 2d 275 (1st Cir. 1978). In all instances, however, the court must evaluate the benefits to plaintiff and the class against the remedial action undertaken by defendant. *Hutto v. Finney*, 437 U.S. 678 (1978). This Court has held, moreover, that an award of attorney's fees is never appropriate when it is based solely upon plaintiffs' victories in preliminary procedural matters; the crux of the attorney's fees award is a determination that the defendant violated federal constitutional law. *Hanrahan v. Hampton*, 446 U.S. 754 (1980).

Here, the Seventh Circuit's affirmance of the District Court's award of fees and the Seventh Circuit's own award of fees improperly establishes a *per se* rule of liability for attorney's fees under Section 1988. Under the Seventh Circuit's holding in *Harrington*, the mere naming of an individual [here, the State Director] as a party defendant, the mere presence of the State Director at settlement conferences, and the State Director's cooperation to achieve substantial benefits for the plaintiff class from the County co-defendants were sufficient bases upon which to conclude that the State was required to contribute to the attorney's fees award. This holding is completely contrary to the purposes of 42 U.S.C. §1988. Congress never intended, through Section 1988, to subject a

defendant to attorney's fees merely because he was named a defendant.

First, there is no question that the plaintiff class prevailed against the Cook County defendants. Even though the plaintiffs' complaint proceeded on a theory of joint and several liability between the State and County for the conditions at Cook County Jail, (R.91, pp.15-17, App. pp. 53a-54a) the remedy fashioned through the Agreed Order does not require or envision joint and several responsibility for the psychiatric programs or services. The Agreed Order places the responsibility solely on the County defendants. (R.114, App. p. 2a) Thus, there existed no causal connection between the relief secured by plaintiffs and the Department of Mental Health's undertakings as represented by the Agreed Order. The substantial benefits secured by plaintiff class were not, and are not provided by the State Director through the Agreed Order.

The Agreed Order, by its very terms, established that plaintiffs are not prevailing parties against the State Director. The State, through the Department of Mental Health, did not agree to furnish any mental health care for pre-trial detainees at Cook County Jail, the State was not obligated to provide any funding for the County's programs, and the State does not supervise, nor in any way administer the County's programs. Thus, to the extent that the Agreed Order provided relief to the named plaintiffs and the class, it represented a legal victory against Cook County exclusively.

Secondly, the Seventh Circuit referred to various activities engaged in by the State Director to support its conclusion that the relief obtained by plaintiffs was causally linked to the State's undertakings. The Seventh Circuit misconstrues the State Director's action in this litigation. Contrary to the Seventh Circuit's characterization, the State does not fund the County's programs and did not pay for the expert panel. The State, in its discretion, furnishes grant money to Cook County,

which the County applies to its psychiatric screening and treatment facilities. Such grants are not required or guaranteed by the Agreed Order or state law and are an uncertain source of funding.

Moreover, the Seventh Circuit's reliance on the District Court's finding when unencumbered County funds were placed in escrow, that there was a substantial likelihood that plaintiffs would prevail on their constitutional claims is misleading. *Harrington, Id.*, at p. 267. The State Director was never involved in the dispute concerning the unencumbered County funds and took no part in that appeal — a fact of which the Seventh Circuit was apprised. (R.95, pp.2-3)

Finally, the Seventh Circuit's ruling in *Harrington* chills a defendant from participating toward settlement. In relying on *United Handicapped Federation v. Andre*, 622 F. 2d 342 (8th Cir. 1980) the Seventh Circuit seems to advocate that a defendant's only option to avoid attorney's fees is to ignore the summons, refuse to cooperate in settlement negotiations and refuse to sign a consent decree — obstreperousness which merely frustrates the courts and the parties.

In summary, plaintiffs were not prevailing parties against the State Director so as to justify any award of attorneys' fees. The relief provided to plaintiffs — psychiatric screening and treatment of pre-trial detainees at Cook County Jail — is furnished exclusively by agencies and officers of Cook County. The State, through its Department of Mental Health, is not obligated to furnish any programs, render any services, provide any funding, supervise, administer, or otherwise control the inauguration and operation of the programs at Cook County Jail. The plaintiffs prevailed solely against the Cook County defendants and the Seventh Circuit's affirmance of the fee allocation improperly adopted a *per se* rule of liability for attorneys' fees.

CONCLUSION

It is clear from the reasons outlined above that an important issue is presented by this petition. Since the presence of multiple units and officers of different levels of local government is not an uncommon situation in a Section 1983 suit, this Court should establish standards and criteria by which attorney's fees pursuant to 42 U.S.C. §1988 should be apportioned and allocated among the various classes of defendants. Petitioner submits that the Seventh Circuit's affirmance of the allocation of attorneys' fees between Cook County and the State of Illinois improperly established a *per se* rule of liability for attorneys' fees based solely upon the State's presence and status as a party defendant. This result does violence to the purposes of Section 1988. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLLINOIS
EASTERN DIVISION

GARY HARRINGTON, et al.,
Plaintiffs,

vs. NO. 74 C 3290

ROBERT DeVITO, et al.,
Defendants.

STIPULATION

IT IS HEREBY STIPULATED by and between the parties through their attorneys in the above entitled cause that the attached Consent Order will be entered by the Court in this cause.

Attorneys for Plaintiffs:

/s/ DAVID GOLDBERGER
American Civil Liberties Union

/s/ SALLY T. ELSON
Legal Assistance Foundation of Chicago

Attorneys for Defendants:

/s/ WILLIAM TUGGLE
Health & Hospitals Governing Commission

/s/ MICHAEL HAYES
Illinois Dept. of Mental Health and Developmental Disabilities

/s/ JOHN DIENNER
Cook County Board of Commissioners and Cook County Department of Corrections

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HARRINGTON, et al.,
Plaintiffs,

vs. NO. 74 C 3290

ROBERT DeVITO, et al.,
Defendants.

AGREED ORDER

In order to provide adequate and necessary mental health care for the plaintiff class, which is certified as all present and future pre-trial detainees in need of mental treatment in the Cook County Department of Corrections, and although there have been no findings or admissions of liability on the part of any defendant, pursuant to agreement of all parties, it is hereby ordered that defendants ROBERT DeVITO, Director, Department of Mental Health and his successor; GEORGE W. DUNNE, President of the Cook County Board of Commissioners and his successor; MATHEW W. BIESCZCAT; MATTHEW ROPA; MILDRED CASEY; FRANK W. CHESROW; JOSEPH A. TECSON; CARL R. HANSEN; IRENE C. HERNANDEZ; JEROME HUPPERT; RONALD R. LARSON; MARY M. McDONALD; RUBY RYAN; JOHN H. STROGER, JR.; MARTIN TUCHOW; HAROLD TYRRELL; JOSEPH I. WOODS, members of the Cook County Board of Commissioners and their successors; THOMAS COONEY; DOROTHY DRISH; CHESTER NOSAL; LOUIS FORD; ARTHUR WADDY, members of the Board of Cook County Department of Corrections and their successors; RICHARD J. ELROD, Sheriff of Cook County and his successor; CHARLES W. DAVIS, Chair-

man of the Health and Hospitals Governing Commission of Cook County and his successors; JOHN W. B. HADLEY, Secretary; FELIPE AYALA; MRS. W. MILES BURNS; SYBILLE FRITZSCHE; ELLSWORTH E. HASBROUCK, M.D.; CHARLES HAYES; GEORGE HILL; DR. JOHN D. SALETTA, members of the Health and Hospitals Governing Commission of Cook County and their successors; JAMES HAUGHTON, Executive Director of the Cook County Health and Hospitals Governing Commission and his successor; and JOHN DEAN, Acting Director of the Cermak Hospital and his successors, shall provide, to the extent required of each defendant as set forth below, the following to the plaintiff class:

Definitions

1. *Screening:* The mental and physical examination of pre-trial detainees, including observation of detainees for gross behavioral abnormalities or indications of ill being, questioning as to prior treatment for mental health problems and consideration of any accompanying record of behavioral abnormalities, or mental health treatment for the purpose of determining their mental health needs, and for classification and placement of them within the Cook County Department of Corrections complex.

2. *County Department of Corrections Complex*: All facilities located at 2600-2800 South California, Chicago, Illinois, which house persons in the custody of the Cook County Department of Corrections, including all Divisions of the Department.

3. *Pre-Trial Detainees*: All persons in the custody of the Cook County Department of Corrections who are awaiting trial on criminal charges.

4. *Mental Health Treatment Units*: Those dormitories, tiers, wings or other areas in the Cook County Department of

Corrections complex which are used for housing or treatment of detainees who have been determined by the mental health team to need mental health care or treatment in areas specially designated for the mentally ill.

5. *Mittimus Patients*: Those persons who are awaiting determination of fitness to stand trial or who have already been found unfit to stand trial, and who have criminal charges pending against them.

A. Section A of this order, the introduction, definitions and Section D, apply to defendants RICHARD J. ELROD, Sheriff of Cook County and his successors; PHILLIP HARDIMAN, Executive Director of the Cook County Department of Corrections and his successor; GEORGE W. DUNNE, President of the Cook County Board of Commissioners and his successor; MATHEW W. BIESCZAT; MATTHEW ROPA; MILDRED CASEY; FRANK W. CHESROW; JOSEPH A. TECSON; CARL R. HANSEN; IRENE C. HERNANDEZ; JEROME HUPPERT; RONALD R. LARSON; MARY M. McDONALD; RUBY RYAN; JOHN H. STROGER, JR.; MARTIN TUCHOW; HAROLD L. TYRRELL; JOSEPH I. WOODS, members of the Cook County Board of Commissioners and their successors; THOMAS COONEY; DOROTHY DRISH; CHESTER NOSAL; LOUIS FORD; ARTHUR WADDY, members of the Board of Cook County Department of Corrections and their successors.

Mental Health Team

1. Members of the mental health team will be provided with prompt access to all areas and all pre-trial detainees at the Cook County Department of Corrections complex.

2. The mental health team will be promptly notified in writing of the transfer of location of any detainee under the mental health team's care.

3. The mental health team, after consultation with the Executive Director of the Department of Corrections, will decide the appropriate placement of detainees in need of mental health care. Such placement will be limited to the Youth building and other areas jointly designated for detainees in need of mental health care.

4. Upon request, all pre-trial detainees will be permitted prompt access to the mental health team for screening or treatment. Written procedures ensuring such access will be promulgated within 30 days of the order, distributed to all staff and permanently posted in conspicuous places in all areas housing pre-trial detainees within the Cook County Department of Corrections.

5. Adequate and timely access will be provided all pre-trial detainees to all necessary diagnostic facilities and procedures, including those facilities and procedures not available at Cermak Hospital but available at Cook County Hospital or other Chicago metropolitan area facilities.

Screening of Detainees

6. Sufficient space and equipment will be made available by County Department of Corrections defendants to allow members of the mental health team to adequately screen pre-trial detainees admitted to the Cook County Department of Corrections in order to determine if they are in need of mental health care or treatment. Disputes regarding sufficiency of space and equipment between any two defendants or any defendant and the mental health team shall be referred to the Executive Directors of the defendant agencies who shall have a conference to resolve the dispute.

7. All pre-trial detainees incarcerated subsequent to the effective date of this order will receive medical and psychiatric screening by qualified personnel prior to permanent tier or

dormitory assignment. The psychiatric screening shall be done by members of the mental health team. Determinations of persons in need of mental health care will be made by the mental health team, after consultation with the Executive Director of the Department of Corrections.

8. Within 90 days of the opening of the Receiving and Diagnostic Center, those detainees who have not been screened in conformity with paragraph 7 above will receive such a screening.

Non-Hospital Residential Mental Health Treatment Units

9. The entire Youth building in Division II will be used exclusively as a residential mental health treatment unit. Upon agreement of the Executive Directors of the defendant agencies and the Director of the Mental Health Team, unused space may be allocated for other purposes.

10. The non-hospital residential treatment units shall contain adequate residential sleeping space and beds for 250 mental health patients. Adequate separate space will be made available within the Youth building for recreational equipment and related activities. Yard privileges will be allowed although a separate yard may be established for the exclusive use by residents of the residential mental health treatment units. The interior walls of the dormitories will be appropriately decorated for the operation of a mental health treatment program.

11. An adequate number of offices for the mental health team will be provided by County Department of Corrections defendants. In addition, at least four private interviewing rooms and additional group therapy rooms will be made available within the Youth building. Sufficient office furniture, chairs, and tables will be provided in these offices and rooms to allow for normal office work, private interviews and group therapy sessions. Disputes between any two defendants,

or between any defendant and the Mental Health Team regarding the adequacy of the number of offices or the sufficiency of the office furniture, chairs or tables shall be referred to the Executive Directors of the defendant agencies who shall have a conference to resolve the dispute.

Security Staffing

12. There will be a ratio of at least one correctional officer for every 10 inmates on each dormitory of the mental health treatment units on each work shift.

13. To the extent possible, correctional officers will be selected for permanent assignment to mental health treatment units according to their ability and interest in working with mentally ill detainees. Present security staff members will receive, within 180 days of the date of entry of this order, special training in the identification, evaluation and custodial care of persons in need of mental health care. This training will be conducted by and be in the form designated by professionals experienced in mental health screening and treatment.

14. New security staff personnel regularly assigned to mental health units will receive this training described in paragraph 13 prior to their assignment.

15. By February 1, 1979, correctional officers employed by the Cook County Department of Corrections will begin to receive 8 hours training, by proper professionals, in the identification and evaluation of persons in need of mental health care. All officers will have completed this course within 310 days after the initiation of the program. Within the same time period, written procedures will be established and disseminated for officer use in the detection of mentally ill detainees and referral of them to the mental health team. On an ongoing basis, all newly hired officers will promptly receive the training described in this paragraph.

Record Keeping

16. The following records will be maintained: requests for treatment (time, date, nature of request) and disposition of such request. Records which are five years or older may be destroyed.

17. The mental health team will be notified promptly in writing of the arrival of detainees from the Department of Mental Health and such records as accompany the detainee will be available for prompt review.

Changes in Population

18. All staff, facilities and equipment requirements set out above are premised upon a total Department of Corrections inmate population of 4,200 persons. If said population increases or decreases for a continuous period of 30 days by 500 or more, the staff, facilities, and equipment will be expanded or contracted proportionately.

19. If the mittimus patient program operated within the facilities of the Department of Mental Health at the time of the entry of this order is, in whole or in part, transferred to facilities of the Cook County Department of Corrections or the Cook County Governing Commission, then, the facilities, staff and treatment requirements set forth in this order will be increased by a proportion which is equal to the following ratio: (a) the daily population of detainees in the custody of the Cook County Department of Corrections who, under the arrangement for mittimus patients in effect at the time of this order, would have been mittimus patients in facilities of the Department of Mental Health; relative to (b) the average daily number of detainees who, for the six month period prior to the date of the transfer of the mittimus patient program, had been placed in special non-hospital residential mental health treatment units.

Disputes Between Mental Health Team and Executive Director of the Cook County Department of Corrections

20. If at any time, the percentage of inmates being housed in mental health treatment units, excluding mittimus patients, exceeds 8% of the total population of the Department of Corrections, the Executive Director of the Cook County Department of Corrections may call for a re-evaluation by all parties of the procedures of the mental health team by giving notice to all parties and their counsel. The parties may then request a re-evaluation of these procedures by the presently designated court appointed panel of experts. If one or more of these panelists is unavailable, he shall be replaced pursuant to Federal Rule of Evidence 706. If no agreement is reached after the panel review, any party may petition the court for appropriate relief.

Panel Review

21. The panel of experts previously appointed by this Court under Federal Rule of Evidence 706 shall review the delivery of mental health care as required by this order, nine months from the date of this order, and shall report to the court with copies to all parties, regarding the defendants' compliance with this order. Funds paid to the Health and Hospitals Governing Commission of Cook County under a grant from the Illinois Department of Mental Health and Developmental Disabilities may be utilized to pay the reasonable expenses of the panel in making this review.

Escrow Money

22. Moneys being held in escrow pursuant to this Court's order of February 9, 1976, shall be released in the following manner:

a) $350,000 shall be released upon entry of this order to allow defendants to begin implementation of the order immediately.

b) The remainder of the funds in escrow will remain in escrow until after the panel of experts has reported to the court regarding implementation of the order. At that time, defendants may petition the court for the release of the remaining funds.

Reports to the Court

23. For a period of two years after the entry of this agreed order or for a longer period of time, if the court should so order, these defendants included in this section shall file with the court, with copies to counsel for plaintiffs, at 3 months, 6 months, 9 months, 1 year, 1½ years and 2 years after the entry of this order, their own report concerning the implementation of the specific provisions of this order, including but not limited to:

(a) The number of suicides at the Cook County Department of Corrections.

(b) The Number of detainees in the hospital mental health units and on the non-hospital residential mental health units.

(c) The number of detainees admitted to the Department of Corrections.

(d) The number of detainees screened by the defendants.

(e) A description of the screening process including but not limited to tests used and questions asked.

(f) Changes in space allocated to the plaintiff class with reasons therefore.

(g) The total population for Cook County Department of Corrections.

(h) Arrangement for mittimus patients.

(i) Implementation of the specific provisions of this agreed order and the adequacy of mental health care being provided to detainees.

Each of the above listed reports or any other reports will specify any inability to comply with the order and will provide a detailed explanation of the reasons for this inability to comply.

Emergency Situations

24. Strict compliance with these arrangements may be temporarily suspended by the Executive Director of the Cook County Department of Corrections for up to fourteen days during emergency situations, but only to the extent necessary to cope with the emergency. Upon petition to the Court with notice to all parties, this fourteen day period may be extended by court order. Labor disputes which interfere with the orderly administration of the Department of Corrections, riots, and epidemics are non-exclusive examples of such emergency situations.

B. Section B of this order, the introduction, definitions and Section D, apply to defendants CHARLES W. DAVIS, Chairman of the Health and Hospitals Governing Commission of Cook County and his successor; JOHN W. B. HADLEY; FELIPE AYALA; MRS. W. MILES BURNS; SYBILLE FRITZSCHE; ELLSWORTH E. HASBROUCK, M.D.; CHARLES HAYES; GEORGE HILL; DR. JOHN D. SALETTA, members of the Health and Hospitals Governing Commission of Cook County and their successors; JAMES HAUGHTON, Executive Director of the Cook County Governing Commission and his successor; and JOHN DEAN, Acting Director of the Cermak Hospital and his successor; GEORGE W. DUNNE, President of the Cook County Board of Commissioners and his successor; MATHEW W. BIESZCZAT; MATTHEW ROPA; MILDRED CASEY; FRANK W. CHESROW; JOSEPH A. TECSON; CARL

R. HANSEN; IRENE C. HERNANDEZ; JEROME HUPPERT; RONALD R. LARSON; MARY M. McDONALD; RUBY RYAN; JOHN H. STROGER, JR.; MARTIN TUCHOW; HARROLD TYRRELL; JOSEPH I. WOODS, members of the Cook County Board of Commissioners and their successors.

Mental Health Team

1. A "mental health team" will be maintained which will provide adequate and necessary mental health treatment to pre-trial detainees. At a minimum, within 60 days, this team will be composed of:

3 full-time psychiatrists
5 psychologists (at least 3 of whom shall have Ph.D. degrees and the other 2 M.A. or M.S. degrees in psychology; in addition all 5 shall have previous clinical experience)
8 medical/psychiatric social workers
4 activities therapists
10 psychiatric mental health techs

2. The exclusive duties of the mental health team will be to provide placement, adequate and necessary mental health screening and treatment for pre-trial detainees in need of mental health care within the Cook County Department of Correctons complex at all times and on all shifts.

3. Adequate and timely access will be provided all detainees to all necessary diagnostic facilities and procedures, including those facilities and procedures not available at Cermak Hospital but available at Cook County hospital or other Chicago metropolitan area facilities.

4. The mental health team, after consultation with the Executive Director of the Department of Corrections, will decide the appropriate placement of detainees in need of mental health care. Such placement will be limited to the Youth

building and other areas jointly designated for detainees in need of mental health care.

Screening of Detainees

4. Sufficient space and equipment will be made available by County Department of Corrections defendants to allow members of the mental health team to adequately screen pre-trial detainees admitted to the Cook County Department of Corrections in order to determine if they are in need of mental health care or treatment. Disputes regarding sufficiency of space and equipment between any two defendants or any defendant and the mental health team shall be referred to the Executive Directors of the defendant agencies who shall have a conference to resolve the dispute.

5. All pre-trial detainees incarcerated subsequent to the effective date of this order, will receive medical and psychiatric screening by qualified personnel prior to permanent tier or dormitory assignment. The psychiatric screening shall be done by members of the mental health team. Determinations of persons in need of mental health care will be made by the mental health team, after consultation with the Executive Director of the Department of Corrections.

6. Within 90 days of the opening of the Receiving and Diagnostic Center, those detainees who have not been screened in conformity with paragraph 5 above will receive such a screening.

Non-Hospital Residential Mental Health Treatment Units

7. The entire Youth building in Division II will be used exclusively as residential mental health treatment unit. Upon agreement of the Executive Directors of the defendant agencies and the Director of the Mental Health Team, unused space may be allocated for other purposes.

Cermak Hospital

8. There will be at Cermak Hospital a psychiatric diagnostic and treatment unit to provide necessary and adequate mental health care, which shall contain a sufficient number of beds for those pre-trial detainees with acute mental problems, all of which shall be within proper wards of the hospital and none of which shall be in the halls of the hospital. The number of beds in each ward shall be in compliance with the Joint Commission on Accreditation of Hospitals hospital standards. This service shall include all necessary and adequate mental health care. In addition, adequate recreational space, equipment and activities will be provided on the psychiatric unit.

9. Assigned solely to this psychiatric unit, in addition to the mental health team, will be a sufficient number of registered nurses and nurse's aides on duty during each of the work shifts to comply with the Joint Commission on Accreditation of Hospitals hospital standards.

Record Keeping

10. Complete records will be kept for all detainees, including at a minimum: requests for treatment (time, date, nature of request and disposition), diagnosis, treatment plan, treatment actually administered (including a record of date and time of medication actually administered), rationale for treatment or treatment change and progress notes.

Changes in Population

11. All staff, facilities and equipment requirements set out above are premised upon a total Department of Corrections inmate population of 4,200 persons. If said population increases or decreases for a continuous period of 30 days by 500 or more, the staff, facilities, and equipment will be expanded or contracted proportionately.

12. If the mittimus patient program operated within the facilities of Department of Mental Health at the time of the entry of this order is, in whole or in part, transferred to facilities of the Cook County Department of Corrections or the Cook County Governing Commission, then, the facilities, staff and treatment requirements set forth in this order will be increased by a proportion which is equal to the following ratio: (a) the daily population of detainees in the custody of the Cook County Department of Corrections who, under the arrangement for mittimus patients in effect at the time of this order, would have been mittimus patients in facilities of the Department of Mental Health; relative to (b) the average daily number of detainees who, for the six month period prior to the date of the transfer of the mittimus patient program, had been placed in special non-hospital residential mental health treatment units.

Disputes Between Mental Health Team and Executive Director of the Cook County Department of Corrections

13. If at any time the percentage of inmates being housed in mental health treatment units, excluding mittimus patients, exceeds 8% of the total population of the Department of Corrections, the Executive Director of the Cook County Department of Corrections may call for a reevaluation by all parties of the procedures of the mental health team by giving notice to all parties and their counsel. The parties may then request a reevaluation of these procedures by the presently designated appointed panel of experts. If one or more of those panelists is unavailable, he shall be replaced pursuant to Federal Rule of Evidence 706. If no agreement is reached after the panel review, any party may petition the court for appropriate relief.

Panel Review

14. The panel of experts previously appointed by this Court under Federal Rule of Evidence 706 shall review the delivery of mental health care as required by this order, nine months from the date of this order, and shall report to the court with copies to all parties, regarding the defendants' compliance with this order. Funds paid to the Health and Hospitals Governing Commission of Cook County under a grant from the Illinois Department of Mental Health and Developmental Disabilities may be utilized to pay the reasonable expenses of the panel in making this review.

Escrow Money

15. Moneys being held in escrow pursuant to this Court's order of February 9, 1976, shall be released in the following manner:

a) $350,000 shall be released upon entry of this order to allow defendants to begin implementation of the order immediately.

b) The remainder of the funds in escrow will remain in escrow until after the panel of experts has reported to the court regarding implementation of the order. At that time, defendants may petition the court for the release of the remaining funds.

Reports to the Court

16. For a period of two years after the entry of this agreed order or for a longer period of time, if the court should so order, these defendants included in this section shall file with the court, with copies to counsel for plaintiffs, at 2 months, 4 months, 6 months, 9 months, 1 year, 1½ years, and 2 years after the entry of this order, their own report concerning the

implementation of the specific provisions of this order including but not limited to:

(a) The number of detainees in the hospital mental health units and on the non-hospital residential mental health units.

(b) The number of detainees under the care of the mental health team but not on residential mental health treatment units.

(c) The number of detainees screened by the defendants.

(d) A description of the screening process including but not limited to tests used and questions asked.

(e) Changes in space allocated to the plaintiff class with reasons therefore.

(f) Arrangement for mittimus patients.

(g) Implementation of the specific provisions of this agreed order and the adequacy of mental health care being provided to detainees.

Each of the above listed reports or any other reports will specify any inability to comply with the order and will provide a detailed explanation of the reasons for this inability to comply.

17. In addition to the reports discussed in paragraph 16 of this order, if at any time the composition of the mental health team or the operation of the mental health program is not in accordance with the minimum requirements set forth in Paragraphs 1 and 2 of Section B for a period of 40 days or more, the defendants shall file a report to the court, with copies to plaintiffs' counsel, stating the reason for this deviation from these minimum requirements and all attempts made to meet the staff requirements of Paragraphs 1 and 2 of Section B.

C. Section C of this order, the introduction, definitions and Section D apply to defendant ROBERT DeVITO, Director of the Illinois Department of Mental Health and his successor, who agrees to provide the following:

Record Keeping

1. A complete record will be kept for all detainees, including at a minimum: requests for treatment (time, date, nature of request and disposition), diagnosis, treatment plan, treatment actually administered (including a record of date and time of medication actually administered), rationale for treatment or treatment change and progress notes.

2. All medical records of detainees admitted from facilities of the Illinois Department of Mental Health and Developmental Disabilities will accompany such detainees in the same manner as the mittimus papers accompanying such detainees.

Screening of Detainees

3. Sufficient space and equipment will be made available by County Department of Corrections defendants to allow members of the mental health team to adequately screen pretrial detainees admitted to the Cook County Department of Corrections in order to determine if they are in need of mental health care or treatment. Disputes regarding sufficiency of space and equipment between any two defendants or any defendant and the mental health team shall be referred to the Executive Directors of the defendant agencies who shall have a conference to resolve the dispute.

Non-Hospital Residential Mental Health Treatment Units

4. The entire Youth building in Division II will be used exclusively as a residential mental health treatment unit. Upon agreement of the Executive Directors of the defendant agen-

cies and the Director of the Mental Health Team, unused space may be allocated for other purposes.

Changes in Population

5. All staff, facilities and equipment requirements set out above are premised upon a total Department of Corrections inmate population of 4,200 persons. If said population increases or decreases for a continuous period of 30 days by 500 or more, the staff, facilities, and equipment will be expanded or contracted proportionately.

6. If the mittimus patient program operated within the facilities of Department of Mental Health at the time of the entry of this order is, in whole or in part, transferred to facilities of the Cook County Department of Corrections or the Health and Hospitals Governing Commission, then, the facilities, staff and treatment requirements set forth in this order will be increased by a proportion which is equal to the following ratio: (a) the daily population of detainees in the custody of the Cook County Department of Corrections who, under the arrangement for mittimus patients in effect at the time of this order, would have been mittimus patients in facilities of the Department of Mental Health; relative to (b) the average daily number of detainees who, for the six month period prior to the date of the transfer of the mittimus patient program, had been placed in special non-hospital residential mental health treatment units.

Disputes Between Mental Health Team and Executive Director of the Cook County Department of Corrections

7. If at any time, the percentage of inmates being housed in mental health treatment units, excluding *mittimus* patients, exceeds 8% of the total population of the Department of Corrections, the Executive Director of the Cook County Department of Corrections may call for a reevaluation by all

parties of the mental health team by giving notice to all parties and their counsel. The parties may then request a reevluation of these procedures by the presently designated court appointed panel of experts. If one or more of those panelists is unavailable, he shall be replaced pursuant to Federal Rule of Evidence 706. If no agreement is reached after the panel review, any party may petition the court for appropriate relief.

Panel Review.

8. The panel of experts previously appointed by this Court under Federal Rule of Evidence 706 shall review the delivery of mental health care as required by this order, nine months from the date of this order, and shall report to the court with copies to all parties, regarding the defendants' compliance with this order. Funds paid to the Health and Hospitals Governing Commission of Cook County under a grant from the Illinois Department of Mental Health and Developmental Disabilities may be utilized to pay the reasonable expenses of the panel in making this review.

Escrow Money

9. Moneys being held in escrow pursuant to this Court's order of February 9, 1976, shall be released in the following manner:

a) $350,000 shall be released upon entry of this order to allow defendants to begin implementation of the order immediately.

b) The remainder of the funds in escrow will remain in escrow until after the panel of experts has reported to the court regarding implementation of the order. At that time, defendants may petition the court for the release of the remaining funds.

Reports to the Court

10. For a period of two years after the entry of this agreed order or for a longer period of time, if the court should so order, these defendants included in this section shall file with the court, with copies to counsel for plaintiffs, at 2 months, 4 months, 6 months, 9 months, 1 year, 1½ years and 2 years after the entry of this order, their own report concerning the implementation of the specific provisions of this order, including but not limited to:

> All reports and evaluations of the Mental Health program made by the Department pursuant to its monitoring of the program under the grant agreement with the Health & Hospitals Governing Commission.

D. *Final Judgment*

This order constitutes a final disposition of this litigation as to all defendants with respect to the injunctive and declaratory relief claimed by plaintiffs and the class. Jurisdiction of this cause is hereby specifically retained by the Court to enter further orders necessary or appropriate to enforce the terms of this agreed order.

Defendants

/s/ WILLIAM TUGGLE
for Health & Hospitals Governing Commission

/s/ JOHN DIENNER
for Cook County Department of Corrections

/s/ JOHN DIENNER
for Cook County Board of Commissioners

/s/ ALLEN E. GRISCHKE
for Illinois Department of Mental Health & Developmental Disabilities

Attorneys for Plaintiffs

/s/ DAVID GOLDBERGER
American Civil Liberties Union

/s/ SALLY T. ELSON
Legal Assistance Foundation of Chicago

Dated: _____ /s/ FRANK McGARR
Judge
U.S. District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HARRINGTON, et al.,
Plaintiffs,

v. No. 74 C 3290

ROBERT DeVITO, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

On November 14, 1974, plaintiffs, pretrial detainees in need of mental health care, sued defendants who are officials of Cook County and the State of Illinois, alleging denial of necessary and adequate mental health care in the Cook County Department of Corrections. It was contended that necessary mental health care available from private or public sources by the citizens of the community generally, was being denied the plaintiffs solely because they were detainees awaiting trial in Cook County. The suit was filed pursuant to 42 U.S.C. §1983 to secure rights guaranteed by the United States Constitution. During the intervening four years, at the direction of the court and with the court participating, all parties have met periodically to discuss progress by the county toward the resolution of the problem of inadequate mental health care for Cook County prisoners, a problem which no party denied existed. Progress in correcting the deficiencies in this respect at the Cook County Jail was slow, but the usual reason was lack of funds. The court concluded throughout these meetings that the defendants were acting in a good faith

attempt to remedy a situation which clearly deserved to be remedied.

At the end of the 1975 fiscal year, it became public knowledge that $742,000 excess funds remained from the budget of the Cook County Department of Corrections, which the Cook County Department of Corrections officials were planning to return to the County Board as unspent funds. At the request of the plaintiffs, this court ordered the funds placed in escrow on February 6, 1976, finding that the plaintiffs had shown a likelihood of success on the merits and that the funds should be retained to be available for correction of the conditions which were the subject of the complaint. The Seventh Circuit upheld this ruling in an unpublished order No. 76-1430 on February 24, 1977.

This court subsequently granted plaintiffs' motion to have a court-appointed panel of experts evaluate the Department of Corrections and the progress it had made since the beginning of the suit in the field of the provision of adequate and necessary mental health care. This evaluation and the recommendations made by the experts formed the basis for a subsequent agreed order in the case, which brought it to a close.

On October 27, 1978, plaintiffs filed their timely motion for attorneys' fees pursuant to the Civil Rights Attorneys Fees Awards Act of 1976. This act vests in the court the discretion to award the prevailing party reasonable attorneys' fees as part of the costs.

This action was pending at the time of the enactment of the attorneys' fees provision discussed above on October 19, 1976. The act applies to cases pending on the date of its enactment. Plaintiffs are prevailing parties within the meaning of 42 U.S.C. §1988. For purposes of an award of fees, parties may be considered to have prevailed when they have vindicated rights through settlement and voluntary agreement, and the

relief obtained by plaintiffs in this case is the result of the filing of the suit and justifies an award of attorneys' fees under the act.

There remains the determination of a reasonable fee. Plaintiffs have requested a total fee in the amount of $25,000. Exhibits are attached itemizing the expenditure of time by Attorney Goldberger at an hourly rate of $60, Attorney Berger at an hourly rate of $50, Attorney Soltman at an hourly rate of $50, and Attorney Elson at an hourly rate of $45. It is the determination of the court that these hourly rates are reasonable and commensurate with the experience and ability of the attorneys involved. An application of these hourly rates to the total time expended results in a total dollar amount of $31,000. Plaintiffs have reduced this amount to $25,000, in order to remain consistent with an estimate of the fees they intended to claim, announced to all parties to provide one of the several background items necessary for negotiation and agreement on the consent decree. The court does not intend to suggest, however, that defendants, in negotiating the final form of the consent decree, concurred in or agreed in any way with the claim for fees in this amount or any other amount.

Defendants object to the amount of fees claimed for the reason *inter alia* that time sheets reflect a duplication of services. When several attorneys cooperate on a case, some duplication is inevitable. It does not seem excessive in these affidavits.

It is the determination of this court that a fee award in the amount of $25,000 is jusitifiable and has been justified, and plaintiffs' motion for attorneys' fees under the Civil Rights Attorneys Fees Awards Act of 1976 is granted in that amount.

The legal principles governing the determination of eligibility for fees and the appropriate amounts thereof are set

forth in the opinion of Judge John Grady in the case of *Lackey v. Bowling*, 78 C 1980 (April 6, 1979), and these principles are adopted by this court to guide its determination here.

We turn to the question of the assessment of fees and the amounts thereof as against the individual defendants. It is the determination of the court that the plaintiffs have prevailed as to all of the parties defendant, each of whom had a role and a responsibility in the area of providing adequate mental health care. The respective responsibility of each of the defendants for the problems put in issue by the complaint and the respective contributions of each of the defendants to the solutions ultimately reached are difficult to assess. The fee award, therefore, of $25,000 is assessed jointly and severally against all of the defendants, with instruction from the court to attempt to allocate it among themselves by agreement. If the parties defendant report to the court that they have been unable to reach such an agreement, a date will be set for hearing and argument and the court will make the allocation.

ENTER:

/s/ FRANK McGARR
UNITED STATES DISTRICT JUDGE

DATED: October 19, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HARRINGTON, et al.,
Plaintiffs,

v. No. 74 C 3290

ROBERT DeVITO, Director of
the Illinois Department of
Mental Health, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

On October 19, 1979, following the approval by the court of an entry of a consent decree in this case, the court filed a memorandum awarding to the plaintiffs attorneys fees in the amount of $25,000.00, which fees were assessed jointly and severally against the defendants.

On March 13, 1980, the Illinois Department of Mental Health, one of the defendants, in the person of Robert DeVito, Director of the Department, and by the Department's attorney, William J. Scott, Attorney General of Illinois, moved the court to determine an allocation of fees between the state department defendant and the Cook County defendant, for the reason that it was the contention of the state defendant that the Illinois Department of Mental Health and the State of Illinois should bear no obligation to pay fees to the plaintiff class.

Thereafter, at the request of the court, the State's Attorney of Cook County, on behalf of the Cook County Department of Corrections, filed a memorandum concerning the division of fees between the state and the county, contending for an

equal division of the responsiblity for the payment of attorneys fees between the state and the county.

The memorandum of the Illinois Department of Mental Health argues that the obligation to provide the mental health facilities and treatment which are the subject of the ultimate decree of the court were the obligations of the County of Cook and the Department of Corrections of Cook County, and that the involvement of the State of Illinois in the case consisted of voluntary assistance to the county in providing a mental health program in the County Jail. The state argues further that, even if fees are to be awarded against the state, they should be minimal, since 34 of the 35 defendants were employees of Cook County, and the services and programs rendered in the Cook County Jail which were the subject of the law suit were the total and sole responsibility of Cook County. The Illinois Department of Mental Health further argues that it filed and had pending during most of the life of this case, a motion to dismiss not ruled upon by the court which was meritorious and should have been resolved in its favor. The state argues finally that some considerable amount of the plaintiff's time was expended in defending in the court of appeals an order of this court impounding certain county funds, a matter on appeal in which the state played no part.

Upon consideration of the contentions of the parties, it is the order of the court that the allocation of fees as between the State of Illinois and the County of Cook be at a ratio of twenty percent of the fees assessed against the State of Illinois and eighty percent against Cook County.

ENTER:

/s/ FRANK McGARR
UNITED STATES DISTRICT JUDGE

DATED: June 24, 1980

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-2070

GARY HARRINGTON, ET AL.,

Plaintiffs-Appellees,

v.

ROBERT DEVITO, Director of the Illinois Department of Mental Health

Defendant-Appellant,

and

GEORGE W. DUNNE, President of the Cook Count Board of Commissioners, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-3290 — Frank J. McGarr, *Judge*.

ARGUED APRIL 29, 1981 — DECIDED AUGUST 10, 1981

Before PELL AND BAUER, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.*

* William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

PELL, *Circuit Judge*. Plaintiffs-appellees, pretrial detainees in need of mental health care, sued Illinois and Cook County officials under 42 U.S.C. § 1983 alleging that the defendants failed to provide necessary mental health care in the Cook County Department of Corrections. The parties negotiated for several years under court supervision to resolve the acknowledged mental health care deficiencies. Ultimately, the parties settled the case by consent order.

On October 19, 1979, the district judge awarded the plaintiffs $25,000 in attorneys' fees pursuant to 42 U.S.C. § 1988 finding that the plaintiffs had prevailed against all of the defendants. The court assessed the fee jointly and severally against Illinois and Cook County Officials, but declined to apportion it at that time. Instead, the court instructed the defendants to attempt to allocate the fee themselves, but to return to court for allocation should they fail to reach an agreement.

The Illinois Department of Mental Health (Department, State, or Illinois) thereafter moved the court to determine the allocation contending that Illinois should not be required to pay any portion of the award. On June 24, 1980, the court ordered Cook County to pay 80%, and the State to pay 20%, of the fee award.

In its appeal of the allocation order, the State argues that the allocation of fees against the State constituted an abuse of discretion[1] because the plaintiffs did not prevail against it, or alternatively, even if they did prevail against Illinois, special circumstances exist which render an award against the State unjust.

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[1] The County defendants have not appealed the 80% apportioned to them, but they agree with the appellant that the plaintiffs did not prevail against the State. In view of our disposition of the case, we need not address the County's argument that if the plaintiffs are found not to have

I.

Attorneys' fee awards under 42 U.S.C. § 1988 rest within the sound discretion of the trial court. *Muscare v. Quinn*, 614 F.2d 577, 579-80 (7th Cir. 1980); *Konczak v. Tyrell*, 605 F.2d 18, 19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

The appellant concedes that the lack of formal judicial relief does not itself deprive the plaintiffs of prevailing party status. Attorneys' fees may be appropriate if the plaintiffs have vindicated their rights by settlement. *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). In *Nadeau*, the First Circuit established guidelines for determining prevailing party status in settlement cases. Subsequently, the *Nadeau* test was adopted by the Eighth Circuit in *United Handicapped Federation v. Andre*, 622 F.2d 342, 345-47 (8th Cir. 1980). Essentially, to prevail in a settled case, the plaintiffs' lawsuit must be causally linked to the achievement of the relief obtained. Secondly, the defendant must not have acted wholly gratuitously, *i.e.*, the plaintiffs' claims, if pressed, cannot have been frivolous, unreasonable, or groundless. *Nadeau v. Helgemoe*, 581 F.2d at 280-81; *United Handicapped Federation v. Andre*, 622 F.2d at 346-47.

The first step, which requires that the lawsuit in some way have played a provocative role in obtaining relief, is a factual determination. *Nadeau* 581 F.2d at 280. The appellant

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Continued from previous page

prevailed against the State the total award should be reduced so that the County would not have to pay the portion now allocated to the State.

Similarly, we need not decide an issue raised in oral argument, but not briefed by the parties, of whether the State's appeal is precluded by its failure to appeal the district court's original order awarding the $25,000 fee against the defendants jointly and severally. In any event, the result, if we were to raise the issue, would be consistent with the disposition we have reached in this case.

argues that the plaintiffs obtained no relief against the Department of Mental Health. While the consent decree itself outlines obligations, many of which relate only to the Cook County defendants, the record supports the district court's implicit conclusion that the State took specific actions in response to the plaintiff's lawsuit. Some of the State's actions taken preceded the consent order, but this does not mean that those actions were any less causally linked to the lawsuit than obligations outlined in the consent agreement itself.[2] The plaintiffs point out that five months after the suit was instituted, the Director of the Department of Mental Health sought a stay of the plaintiffs' discovery representing that the defendants were then formulating a plan to alleviate conditions the plaintiffs were complaining about. This "start-up" plan included diagnosis and placement of incoming inmates, implementation of a tripartite treatment program, and ongoing diagnosis and evaluation of the general prison population's mental health needs. This program was originally funded by a Department grant of $151,800. The Department continued to fund half of each year's operation of the Cook County Department of Corrections' mental health program since 1976, participated in the selection of an expert panel to assess conditions, paid for the panel review, and participated in the consent agreement.

Even apart from these events, the Department of Mental Health agreed to perform certain limited obligations in the consent order itself. The State agreed, *inter alia*, to participate in (1) any reevaluations of the mental health team occurring pursuant to circumstances specified in the order, and (2) the resolution of disputes relating to space and equipment

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[2] Whether or not the State's actions in response to the lawsuit, taken as a whole, were purely gratuitous, as the State contends, is not relevant to the first prong of the *Nadeau* analysis, but will be analyzed as a separate element of the test.

needs for mental health screening. The Department additionally agreed to file with the court, and to submit copies to plaintiffs' counsel, reports regarding the implementation of specific provisions of the order including Department reports made pursuant to its monitoring of the program under the grant agreement with the Health and Hospitals Governing Commission. The Department argues, however, that it was obligated under Illinois law to compile grant-in-aid monitoring reports in any event. While there may be an overlap between some of the obligations imposed by the consent agreement and the Department's existing legal duties, we view the evidence of the Department's participation as a whole in this case as supporting a conclusion that the Department did take certain steps to alleviate deficiencies in mental health treatment of pretrial detainees as a result of the plaintiffs' lawsuit. Especially because all of these actions followed soon after the institution of this lawsuit, it is not unreasonable to suppose that they were causally related to the lawsuit. As the Court in *Nadeau* noted,

> the chronological sequence of events [is] . . . an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and is not easily available to plaintiff.

581 F.2d at 281. *See United States Handicapped Federation v. Andre*, 622 F.2d at 347; *Lackey v. Bowling*, 476 F.Supp. 1111, 1115 (N.D. Ill. 1979) ("That the threat and then the filing of this lawsuit at least hastened defendants' change of policy is clear.")

This case is unlike *United Handicapped Federation v. Andre* to the extent that the *Andre* plaintiffs prevailed only against local, and not federal, defendants. The federal defendants in that case took no part in ongoing negotiations and did not participate in the settlement stipulation. 622 F.2d at 345, 348 n.6. The separate dismissal stipulation executed between the plaintiffs and the federal defendants in *Andre* imposed no obligations whatsoever on the federal defendants. *Id.* at 345 n.2.

The State argues that the Department "acted gratuitously and in good faith to assist in curing a serious problem." As the court in *Nadeau v. Helgemoe* admonished, however, the good faith of the defendant is irrelevant because the "key issue is the provocative role of the plaintiff's lawsuit, not the motivations of the defendant." 581 F.2d at 280.

The second prong of *Nadeau*, however, does require that the defendant's actions not be gratuitous. The First Circuit recognized that the resolution of this aspect of the test is necessarily difficult:

> In the present case ... there has not yet been a judicial determination of whether plaintiffs' rights were violated under traditional standards of analysis. In such circumstances, one might argue that the district court cannot meaningfully decide the legal requirements that govern defendants' conduct without conducting the very trial the consent decree was signed to avoid. However, we believe the court has had sufficient exposure to the facts and law of this case to determine, whether if plaintiffs had continued to press their claims under traditional constitutional theory, their action could be considered "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."

581 F.2d at 281 (citation omitted). In the instant case, the district court clearly did not veiw the plaintiffs' claims as frivolous. In fact, in its October 19th order, the court referred to its earlier finding, in a prior order placing unencumbered funds of the Cook County Department of Corrections in escrow,[3] that a substantial likelihood existed that the plaintiffs would ultimately prevail against the defendants on their constitutional claims. The court considered both State and County defendants to be responsible for providing adequate mental health care to the plaintiffs in this case. Although it never ruled upon the State's Motion to dismiss, the court reviewed, and by its award implicitly rejected, the State's allegation that its role was purely voluntary. We are satisfied that the district court's conclusion was correct.

II.

The State also urges that the court's apportionment award constituted an abuse of discretion because special circumstances rendered the award unjust, citing *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976). The court in *Chastang* refused to disturb the district court's denial of attorneys' fees based on special circumstances. Among the court's many justifications for its affirmance was the fact that the trustee of a pension fund had no right unilaterally to alter the pension plan terms. The State seeks to analogize that finding to its position that, under Illinois law, the Department was not at all responsible for the care and treatment of pretrial detainees in Cook County correctional facilities, and was therefore an inappropriate party defendant. Initially, this argument overlooks the fact that the Department was sued for constitutional violations. State statutes and regulations, therefore, would not necessarily have been dispositive of its

[3] That ruling was upheld by this court in an unpublished order, No. 76-1450 (Feb. 24, 1977).

obligations. More importantly, however, *Chastang's* conclusion did not rest solely upon the finding that the State urges. Ultimately, the court decided that "[b]ecause the plan was amended to eliminate its illegally discriminatory aspects *before* plaintiffs' suits were filed, they cannot be said to have derived any benefit, direct or indirect, from the litigation." *Id.* at 1045 (emphasis added). Interpreted under a *Nadeau* analysis, the *Chastang* court ultimately found no connection between the lawsuit and the relief obtained. We have previously found that the record in this case supports the district court's implicit finding of causal connection, and we are not persuaded that any special circumstances existed sufficient to upset the district court's award.

III.

Appellate review of a district court's discretion is very limited. Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found. *Particle Data Laboratories, Inc. v. Coulter Electronics, Inc.*, 420 F.2d 1174, 1178 (7th Cir. 1969). Having heard oral argument and reviewed the briefs and the record, we are convinced that the trial court's apportionment of 20% of the attorneys' fee award against the State clearly did not constitute an abuse of discretion. *Cf. Maher v. Gagne*, 448 U.S. 122, 129-30 (1980) ("Nor can we accept petitioner's contention that respondent did not gain sufficient relief through the consent decree to be considered the prevailing party. The District Court's contrary finding was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages. That finding was upheld by the Court of Appeals, and we see no reason to question its validity.")

The appellant contends that upholding fee awards in cases such as this will discourage settlement because "[u]nder the District Court's ruling, neither cooperation nor voluntary participation to achieve relief for the plaintiff class, will relieve defendant of attorneys' fees." While we sympathize with the State's position, we agree with the First Circuit's observation that

> the argument cuts both ways. If defendants may refuse to settle a case and accept the cost of continued litigation to avoid paying attorney's fees, it is equally likely that plaintiffs' counsel, rather than receive no compensation at all for their efforts, would be willing to continue the litigation on the chance that they might cut if not eliminate their losses. We cannot decide this issue based on such honest but speculative concerns.

Nadeau v. Helgemoe, 581 F.2d at 282.

Also, we think it is appropriate to observe that counsel would ordinarily be well advised when negotiating a settlement to endeavor to reach an agreement as to all potential issues rather than relying on the hope that troublesome ones not disposed of somehow will just go away. Such an incomplete package often, not suprisingly, will have tremellose aspects.

Finally, the court's failure to explicate the precise reasons for its allocation does not imply, *a fortiori*, that it applied an erroneous standard as the State contends. Reviewing the award under the analysis set forth in *Nadeau v. Helgemoe* and *United Handicapped Federation v. Andre*, we find the court's award to be supported by the record.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 23, 1981

Before

HON. WILBUR F. PELL, JR., Circuit Judge

GARY HARRINGTON, et al.,
Plaintiffs-Appellees,

No. 80-2070 vs.

ROBERT DE VITO, Director of the Illinois Department of Mental Health,
Defendant-Appellant,

GEORGE W. DUNNE, President of the Cook County Board of Commissioners, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 74-C-3290
Judge Frank J. McGarr

This matter comes before the Court for its consideration upon the following documents:

1. The "MOTION FOR ATTORNEYS' FEES ON APPEAL" filed herein on August 19, 1981, by counsel for the plaintiffs-appellees.
2. The "RESPONSE" filed herein on September 14, 1981, by counsel for the defendant-appellant.

On consideration thereof,

"IT IS ORDERED" that the "MOTION FOR ATTORNEYS' FEES ON APPEAL" is hereby "GRANTED", and the plaintiffs-appellees are hereby "AWARDED" attorneys' fees in the amount of $4,646.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARY HARRINGTON, ALAN JOHNSON, a/k/a RENALDO WATSON, CHARLES DAVIS and ROBERT JONES, Individually and on behalf of all other similarly situated,

Plaintiffs,

-vs-

LEROY LEVITT, Director of the Illinois Department of Mental Health; GEORGE W. DUNNE, President of the Cook County Board of Commissioners; MATHEW W. BIESZCZAT; CHARLES S. BONK; MILDRED CASEY; FRANK W. CHESROW; JOSEPH TECSON; CARL K. HANSEN; IRENE C. HERNANDEZ; JEROME HUPPERT; RONALD R. LARSON; MARY M. McDONALD; RUBY RYAN; JOHN J. STROGER, JR; MARTIN TUCHOW; HAROLD TYRRELL; JOSEPH I. WOODS, members of the Cook County Board of Commissioners; THOMAS COONEY; DOROTHY DRISH; CHESTER NOSAL; LOUIS FORD; MARVIN ASPEN, members of the Board of the Cook County Department of Corrections; RICHARD J. ELROD, Sheriff of Cook County, WINSTON MOORE, Director of the Cook County Department of Corrections;

NO. 74 C 3290

EDWARD BRASHEARS, Chairman of the Health and Hospitals Governing Commission of Cook County; MRS. W. MILES BURNS; JOHN W.B. HADLEY; ELLSWORTH E. HASBROCK; CHARLES A. DAVIS; SYBILLE FRITZSCHE; CHARLES HAYES; GEORGE HILL; EDWARD A. TYLER, members of the Health and Hospitals Governing Commission of Cook County; JAMES HAUGHTON, Executive Director of the Cook County Governing Commission and VIVIAN SODINI, Acting Director of the Cermak Hospital,

Defendants.

SECOND AMENDED COMPLAINT

1. Plaintiff pretrial detainees who are in need of mental treatment sue officials of the Cook County Department of Corrections, the Cook County Board of Commissioners, officials of the Cook County Hospital Governing Commission and the Illinois Department of Mental Health and Developmental Disabilities for denying them and others similarly situated necessary and adequate mental health care. Plaintiffs seek declaratory and injunctive relief and damages on grounds that defendants' denial of adequate and necessary mental health care violates plaintiffs' rights to due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331 and 1343. The suit is brought pursuant to the provisions of 42 U.S.C. §1983 to vindicate claims arising under the Fourteenth Amendment to the United States Constitution.

Declaratory relief is authorized by 42 U.S.C. §§2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure. The matter is controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

3. Plaintiff Gary Harrington is a former pretrial detainee in need of mental treatment who was confined to the detention facilities of the Cook County Department of Corrections. He previously was a patient of the Department of Mental Health and Developmental Disabilities transferred to the Cook County Department of Corrections because of an offense he is alleged to have committed while receiving mental health care. He was confined for at least nine months without mental treatment in custodial units of the Cook County Department of Corrections until charges were dropped.

4. Plaintiff Alan Johnson, a/k/a Renaldo Watson, is a pretrial detainee in need of mental treatment who has been and is presently confined to the detention facilities of the Cook County Department of Corrections. He has been and is being confined without mental health care in custodial units for pretrial detainees. He has previously been treated at the Chicago-Read State Mental Hospital.

5. Plaintiff Charles Davis is a pretrial detainee in need of mental treatment who is presently confined to the detention facilities of the Cook County Department of Corrections. He has been and is being confined without mental health care in custodial units for pretrial detainees. He has previously been treated at Manteno State Hospital.

6. Plaintiff Robert Jones has been a pretrial detainee who was confined for long periods of time to custodial units of the Cook County Department of Corrections without mental health care. After lengthy pretrial confinement without mental health care, a judgment was entered against him in criminal proceedings and he was transferred to the Illinois Department of Corrections.

7. Plaintiffs seek equitable relief pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other pretrial detainees who are or will be in the custody of the Cook County Department of Corrections and who are or will be in need of necessary and adequate mental treatment during their detention but who are being or will be denied such treatment. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The representative plaintiffs will fairly and adequately protect the interest of the class. Common questions of law and fact predominate over any questions affecting only individual members, and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

8. Defendants are:

(a) LeRoy Levitt, who is the Director of the Illinois Department of Mental Health and Developmental Disabilities and has the responsiblity for administration of the Illinois Department of Mental Health, its employees and its subdivisions. (Ill. Rev. Stat., Ch. 91-½, §100-2 *et seq.*(1973))

(b) George W. Dunne, President of the Cook County Board of Commissioners; Mathew W. Bieszczat, Charles S. Bonk, Mildred Casey, Frank W. Chesrow, Joseph Tecson, Carl K. Hansen, Irene C. Hernandez, Jerome Huppert, Ronald R. Larson, Mary M. McDonald, Ruby Ryan, John J. Stroger, Jr., Martin Tuchow, Harold Tyrell and Joseph I. Woods, members of the Cook County Board of Commissioners

who are responsible for appropriation and provision of funds for necessary, ordinary and contingent costs of the Cook County Department of Corrections. (Ill Rev. Stat., Ch. 125, §215 (1973));

(c) James Cooney, Dorothy Drish, Chester Nosal, Louis Ford, and Marvin Aspen, members of the Board of the Cook County Department of Corrections who are responsible for recommending policy and establishing rules for the administration of the Cook County Department of Corrections.

(d) Richard J. Elrod, who is Sheriff of Cook County under whose direction the Cook County Department of Corrections is operated. (Ill. Rev. Stat., Ch. 125, §201 *et seq.* (1973));

(e) Winston Moore, who is the Director of the Cook County Board of Commissioners and acts as the chief executive and administrative officer of the Cook County Department of Corrections. (Ill. Rev. Stat., Ch. 125 §212 (1973));

(f) Edwin Brashears, Chairman of the Health and Hospital Governing Commission of Cook County; Mrs. W. Miles Burns, John W.B. Hadley, Ellsworth E. Hasbrock, Charles A. Davis, Sybille Fritzsche, Charles Hayes, George Hill and Edward A. Tyler, members of the health and hospitals Governing Commission of Cook County, who are responsible for organizing, operating, maintaining and managing the hospitals owned by Cook County, including but not limited to the Cermak Hospital. (Ill. Rev. Stat., Ch. 34, §5020 (1973));

(g) James Haughton, who is Executive Director of the Governing Commission of the Cook County Hospital and acts as chief executive and administrative officer of the Cook County Hospital and its subdivisions. (Ill. Rev. Stat., Ch. 4, §5011, *et seq.* (1973)); and

(h) Vivian Sodini, who is Acting Director of the Cermak Hospital and acts as chief administrative officer of the Cermak Hospital.

9. The Illinois Department of Mental Health and Developmental Disabilities is the department of the State of Illinois which is responsible for provision of mental health care to all persons in Illinois who are in need of mental treatment. In fulfilling its responsibility, it provides mental health care to persons in need of mental treatment via hospitals, mental health programs and contractual services throughout the State of Illinois. (Ill. Rev. Stat., Ch. 91-½, §100-1, *et seq.* (1973)).

10. The Cook County Department of Corrections is the governmental subdivision of Cook County which consists of the Cook County Jail, the House of Correction, Cermak Hospital and the Women's Detention Center where all Cook County pretrial detainees are held until their cases are tried or otherwise acted upon by the Circuit Court of Cook County. The Cook County Department of Corrections contains in excess of 4,000 persons, the majority of whom are pretrial detainees. (Ill. Rev. Stat., Ch. 125, §201 *et seq.* (1973)).

11. Cermak Hospital is a hospital which is located in the complex of buildings comprising the Cook County Department of Corrections. It is operated by defendant officials of the Cook County Governing Commission and the Cook County Department of Corrections and is staffed by Commission employees and by guards from the Cook County Department of Corrections. It contains approximately 80 beds for general medical

care of which 22 are regularly allocated for emergency, short-term care of mentally ill pretrial detainees.

12. Pretrial detainees in custody at the Cook County Department of Corrections who are in need of mental treatment are assigned to Cermak Hospital, Youth J Dormitory, or Unit II. They are also assigned without screening for mental illness to the general population of the Cook County Jail or House of Corrections. The average number of such pretrial detainees at any time is approximately 250 of which only twenty or thirty, who are assigned to the Cermak Hospital, receive mental health care.

13. During the period between November, 1974 and February 2, 1976, pretrial detainees in need of mental health care were variously housed without treatment on Tier F-1, Ward I, Ward II or the West Cellhouse of the Cook County Department of Corrections:

(a) Tier F-1 is a unit of the Cook County Jail which was originally designed, like the other tiers at that institution, to house 45 men. Prior to February 2, 1976, it contained approximately 100 pretrial detainees who were in need of mental treatment. The tier was composed of a dayroom which was approximately 20′ × 30′ and 40 cells which were approximately 5′ × 10′. The small cells lined each side of a long hall which led from the dayroom to a wall of the jail building. The dayroom was furnished with wooden picnic tables and benches. Mattresses were placed on the floor for use at night. On or about Febraury 2, 1976, it was closed down as uninhabitable. Inmates in need of mental treatment formerly housed therein were transferred to Youth J Dormitory or the general population.

(b) The West Cellhouse, a subdivision of the House of Corrections, was a large rectangular building. It was a dilapidated structure approximately 300' × 100' containing in excess of 40 pretrial detainees in need of mental treatment. On each wall there were three tiers of one-man cells containing either one or two prisoners. The sole medical treatment available to the inmates was first aid provided by former military medical corpsmen and did not include mental health care. During, 1975, following a suicide by self-immolation, the West Cellhouse was closed down as uninhabitable and completely demolished. Inmates in need of mental treatment formerly housed therein were transferred to Youth J Dormitory or the general population.

(c) Ward I and II are located in the basement of the Cook County Jail. They are dormitory-type units which prior to July of 1975 housed persons believed by defendant Moore and his employees to be in need of mental treatment. These wards also contained juveniles and persons convalescing from physical illnesses. Both wards consisted of an anteroom containing bunkbeds and a main room containing beds and bedstands along the wall. Due to overcrowding in Ward I, there were also bunkbeds placed in the hallway which led to the ward. There were approximately 28 inmates in Ward I and 24 inmates in Ward II. During July of 1975, the units were closed down as uninhabitable. Inmates in need of mental treatment formerly housed therein were transferred to Youth J Dormitory or the general population.

14. In lieu of mental treatment of the pretrial detainees confined in Tier F-1, two guards were locked in the dayroom

for substantial periods of time each day so that they could restrain detainees from inflicting harm on themselves or others. The sole medical staff consisted of former military medical corpsmen. There were no exercise, recreation, counseling, or education programs.

15. During the night, detainees on Tier F-1 were required to sleep on mattresses lining the dayroom floor where they were in full view of the guard station. They were prohibited from using the small cells with bunkbeds because the cells were not in full view of the guard stations and therefore might be locations where detainees might inflict harm upon themselves or others.

16. The detainees on Tier F-1 who became violent and beyond the ability of guards to control were handcuffed to the bars of the cells or were tied up with their bedsheets. Also as a result of emotional disturbances, some detainees periodically urinated and defecated on the floor of the dayroom, refusing to use available toilet facilities.

17. Some inmates in Tier F-1 who were in need of mental treatment and whose symptoms were acute were transferred to Ward I and Ward II. There they were provided with custodial care. On infrequent occasions the wards were visited by a doctor who prescribed medication but provided no mental treatment.

18. Pretrial detainees who were assigned to Ward I and Ward II who were believed to be difficult to control or who jail personnel believed might become violent were placed in leather belts with one end attached to the inmate and the other to a bed frame.

19. Subsequent to the closing down of Tier F-1, Ward I, Ward II and the West Cellhouse, pretrial detainees in need of mental treatment were summarily transferred, without screening for mental illness, to J Dorm, Unit II and the general popu-

lation where they are provided with custodial supervision but are still not provided with necessary and adequate mental health care.

20. The J Dorm is a dormitory room located in the Youth Dormitory of the Department of Corrections. J Dorm has a capacity of approximately 40 inmates although it is presently overcrowded, containing 55 to 65 persons in need of mental treatment. It contains a cot for each person although few cots regularly have sheets. The room contains no other furniture for use by inmates.

21. The residents of J Dorm are pretrial detainees in need of mental treatment who are frequently denied bedding, clean clothes, toothbrushes, soap, stationery, and stamps. They receive no regular exercise other than occasional calisthentics in the front portion of the ward.

22. Unit II is across the hall from J Dorm and contains approximately 10 pretrial detainees in need of mental treatment. The unit consists of a large, poorly lit dayroom surrounded by numerous individual cells. The windows of each of the cells have been broken out and are covered with sheets of plastic or boards permitting the room to get extremely cold when the temperature drops below freezing.

23. Some pretrial detainees in need of mental treatment are scattered throughout the Cook County Jail, Work Release Building, and the House of Corrections. None receives screening to determine extent of need for mental health care and none receives mental health care or supervision of any kind. Many are housed in the general population without attention until they attempt suicide or engage in other bizarre or destructive behavior.

24. A small number of the 250 pretrial detainees in need of mental treatment are temporarily transferred to the Cermak Hospital. There they receive emergency mental health care

for the purpose of temporarily alleviating acute symptoms. After the most acute symptoms are alleviated, the detainees are returned to J Dorm, Unit II or the general population.

25. The pretrial detainees who receive emergency mental health care at the Cermak Hospital and are returned to J Dorm, Unit II or the general population receive no additional mental health care. As a result, their mental condition again deteriorates. No subsequent transfer back to Cermak Hospital occurs unless there is available hospital bed capacity.

26. As a result of the lack of treatment pretrial detainees in need of mental treatment and retained in J Dorm, Unit II or the general population experience extreme psychological distress, and mental illness, causing suicide or attempted suicide in many cases. During September of 1974 one of the pretrial detainees in need of mental treatment committed suicide by setting himself on fire. Other suicides and attempted suicides have occurred since that date with increasing frequency, including a suspected suicide on January 20, 1976.

27. Plaintiff Gary Harrington entered the House of Correction in June of 1974 exhibiting acute symptoms of mental illness. On or about June 3, 1974, Cook County Department of Corrections employees determined that plaintiff Harrington was in need of emergency mental treatment and transferred him to Cermak Hospital. On or about June 17, 1974, after he recovered from the most acute symptoms, he was transferred to Ward I of Cook County Jail. Subsequent to that assignment, his mental condition deteriorated rapidly and he again exhibited acute symptoms of mental illness. On June 24, 1974, he was again transferred to the Cermak Hospital. On July 2, 1974, after the most acute symptoms of his mental illness subsided, he was transferred to Tier F-1 of the Cook County Jail. Receiving no treatment there, his condition again deteriorated severely and he was again transferred to

Cermak Hospital on September 12. In October of 1974 he was again transferred to Ward I and then back to Cermak Hospital. Subsequently charges against him were dropped and he was transferred to the custody of Wisconsin mental health authorities.

28. Plaintiff Alan Johnson, a/k/a Renaldo Watson, was admitted to the Cook County Jail on or about June 28, 1974, at which time he was assigned to F-1 where defendants provided no mental health care. As a result of defendants' failure, his mental health deteriorated so that he was barely able to communicate with others and could no longer recall the charges pending against him. He was subsequently transferred to the Department of Mental Health and Developmental Disabilities and on or about February 5, 1975, was returned to custody of the Cook County Department of Corrections.

29. Plaintiff Charles Davis entered the Cook County Jail on or about October 28, 1974 subsequent to discharge from Manteno State Hospital where he had been treated in order to attain competence to stand trial. His Manteno State Hospital discharge papers instructed defendants that he was to receive daily medication consisting of Trilafon and Elavil for the purpose of keeping his mental condition stable. At no time subsequent to his arrival at the Cook County Jail did defendants provide plaintiff Davis with mental health care or prescribed medication. His mental condition seriously deteriorated. Thereafter, during the early months of 1975, plaintiff Davis was transferred back to Manteno State Hospital and in late 1975 was again returned to the Cook County Department of Corrections.

30. Plaintiff Robert Jones entered the Cook County Jail on August 8, 1974. At that time Cook County Department of Corrections employees determined that plaintiff Jones was in need of mental treatment and assigned him to Tier F-1 with others similarly situated where he was provided with no men-

tal health care. On or about August 9, 1975, plaintiff Jones, who was still in need of mental treatment, was transferred to Ward I, and shortly thereafter to Ward II, where he continued to be provided with no treatment for his mental illness. While on Ward II, he was attacked by a fellow inmate who was also in need of mental treatment and suffered severe injury to his left ear.

31. Defendants jointly and severally, are not providing necessary and adequate mental health care to plaintiffs and others similarly situated. At present there are only 22 hospital beds available for approximately 250 mentally ill pretrial detainees and there are insufficient funds, facilities and staff to provide mental health care.

32. Defendant Levitt and employees of the Illinois Department of Mental Health refuse to provide necessary and adequate mental health care to plaintiffs and other pretrial detainees in need of mental treatment on grounds that employees of the Illinois Department of Mental Health have no obligation to provide mental health care to plaintiffs and others similarly situated.

33. All persons in Illinois in need of necessary and adequate mental treatment except plaintiff pretrial detainees are supplied such treatment or are eligible for such treatment from defendant Levitt, his employees, agents and successors in facilities supervised or provided by the Illinois Department of Mental Health and Developmental Disabilities.

34. The joint and several failure of the defendants to provide adequate mental health care to plaintiffs and all other pretrial detainees similarly situated is inflicting continuous irreparable harm on the mental and physical health of plaintiffs Harrington, Jones, Davis and Johnson and others similarly situated, which is not abating and will not abate in the future.

35. Defendants' joint and several failure to provide necessary and adequate mental health care to pretrial detainees in need of mental treatment denies plaintiffs and members of the plaintiff class their rights under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that they are:

(a) arbitrarily and unreasonably denied their right to necessary and adequate mental treatment although such denial is unrelated to the purposes of pretrial detainees;

(b) arbitrarily and unreasonably denied their right to necessary and adequate mental treatment although all other persons in the State of Illinois in need of mental treatment receive or are eligible to receive such treatment.

36. As a direct result of the aforesaid intentional acts, omissions, denials and/or policies engaged in by defendants, plaintiffs have been deprived of adequate and necessary mental health and well being and are sustaining actual and punitive damages in the amount of $600,000 each.

37. Defendants' continuing failure to provide necessary and adequate mental health care to plaintiffs and others similarly situated inflicts irreparable harm for which there is no complete and adequate remedy at law.

WHEREFORE, plaintiffs pray as follows:

1. That this Court issue a declaratory judgment stating that defendants' joint and several denial of adequate and necessary mental health care to plaintiffs and others similarly situated is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution;

2. That this Court issue a preliminary and then a permanent injunction ordering defendants jointly and severally to

provide adequate and necessary mental health care to plaintiffs and others similarly situated;

3. That this Court enter judgment for each and every plaintiff against each defendant in the amount of $500,000 as and for compensatory damages and $100,000 as and for punitive damages.

4. That this Court grant such other and further relief as may be just and proper under the circumstances.

Respectfully submitted,

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Opposition

No. 81-868

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT DEVITO, Director of the Illinois Department of Mental Health,

Petitioner,

v.

GARY HARRINGTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Gary Harrington, et al., respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

QUESTION PRESENTED

Whether the appellate court was correct in ruling that the trial court did not abuse its discretion when it found the Director of the Illinois Department of Mental Health liable for 20 per cent ($5000) of a $25,000 attorneys' fees award because the Director had taken certain substantial steps to provide relief to plaintiffs as a result of plaintiffs' lawsuit.

STATEMENT OF THE CASE

On November 14, 1974, respondents, pre-trial detainees in need of mental health care and housed in Cook County Department of Corrections facilities, sued certain officials of Cook County, Illinois and the State of Illinois, alleging that they were being denied necessary and adequate mental health care. The pre-trial detainees' suit was filed pursuant to 42 U.S.C. §1983 to secure rights guaranteed by the Fourteenth Amendment to the United States Constitution. (Appendix 41a-55a, Second Amended Complaint) On March 10, 1975, the District Court certified the class of pre-trial detainees in need of mental health care in the custody of the Cook County Department of Corrections. The class included pre-trial detainees committed by court order to the care of the Illinois Department of Mental Health for psychiatric evaluations but who were nevertheless housed at the Cook County Department of Corrections.

Respondents' allegations against the petitioner, the Director of the Illinois Department of Mental Health and Developmental Disabilities (Director DeVito) were that all defendants were jointly and severally responsible for the unconstitutional denial of necessary and adequate mental health care to plaintiffs. Director DeVito refused to provide any mental health care to plaintiffs on the grounds that his department had no obligation to provide such care. All other persons in Illinois in need of mental health care (including prisoners) were provided such treatment by or were eligible for such treatment from petitioner in facilities supervised or provided by his department. This discrimination against pre-trial detainees alone was alleged to be unconstitutional. Moreover, some of the class members were persons whom the courts had committed to defendant DeVito's custody but who were refused admission to his facilities and were not receiving any mental health care even though

they were his statutory responsibility. Plaintiffs alleged that the harm to plaintiffs from the denial of any mental health care was caused by the joint and several failure of all defendants to provide such care, was not rationally related to the legitimate nonpunitive governmental purposes of pre-trial detention, and was arbitrary and unreasonable and in violation of plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

On February 6, 1976, the District Court ruled that plaintiffs-respondents had shown a likelihood of success on the merits and that certain unexpended funds should be retained to be available for correction of the conditions which were the subject of the complaint. The Seventh Circuit affirmed this ruling in an unpublished order on February 24, 1977.

The District Court was extensively involved with the case for over four years, principally through a multitude of pre-trial conferences, during which all parties agreed that there was a lack of mental health care for plaintiffs, but no defendant would agree to bear responsibility for that lack of care or for remedying the situation. (App. 23a-26a) The District Court spent substantial time attempting to arrive at a settlement.

On April 14, 1975, five months after the suit was filed, Director DeVito had moved to stay plaintiffs' discovery, stating that he was:

> formulat[ing] a plan to help alleviate the alleged basis for plaintiffs' complaint, [and that he was] currently actively engaged in formulating such a plan and hope[d] to present it to the court April 25, 1975.*/

*/ The District Court stayed discovery, pursuant to Director DeVito's motion, for purposes of assisting in settlement. In September, 1975, however, plaintiffs moved to vacate the stay. Director DeVito had continued, plaintiffs alleged in that motion, to refuse to accept for treatment persons committed to his care but still housed at the Cook County Department of Corrections ("mittimus" patients). This failure to accept patients committed by court order to the care of the petitioner, plaintiffs alleged, denied such persons the care to which they were entitled and "exacerbated the conditions of confinement for [all of] the mentally ill at the Cook County Jail." The motion was denied so that the parties would continue to negotiate settlement. Eventually, petitioner agreed to accept the "mittimus" patients.

Director DeVito devised a plan and, joined by all other defendants, proposed it to the Court. The plan provided for: a) diagnosis and placement of persons in need of mental health care; b) implementation of a "tripartite treatment program," consisting of ambulatory care, supervised wards, and hospital care for the acutely mentally ill; and c) ongoing diagnosis and evaluation of the general jail population. The plan began with an initial grant from Director DeVito of $151,800 for mental health care of plaintiffs. The final agreed order in the case was later to parallel many aspects of this plan.

Director DeVito continued to fund half of each year's operation of the mental health program at the Cook County Department of Corrections after 1976; he participated in the selection of the expert panel appointed by court order to evaluate the mental health care program; he paid for the panel review; and he ultimately signed the agreed order, along with all other parties, on October 19, 1978. (App. 22a)

The role of Director DeVito under the agreed order, while not that of the primary actor, nevertheless remains significant. As the introduction to the order sets forth, all defendants signed the decree "...to provide adequate and necessary mental health care" to plaintiffs. (App. 2a) The order then outlines the specific acts required to provide such care, requiring many duties from the county officials, and some from Director DeVito. Director DeVito is to supply medical records for patients returning to the custody of the Cook County Department of Corrections from the Illinois Department of Mental Health (DMH) (App. 18a), and is to participate in resolution of disputes regarding space allocation for class members (App. 18a-19a) and disputes generally. (App. 19a-20a) Director DeVito also paid for the expert panel's post-decree review and evaluation (App. 20a); and he reviews implementation and files reports with the

court. (App. 21a)

After entry of the Consent Order, plaintiffs filed a timely motion for attorneys' fees under the Civil Rights Attorneys' Feew Award Act of 1976, 42 U.S.C. §1988. On October 19, 1979, the District Court found, inter alia, that for purposes of awarding fees, plaintiffs had prevailed against all defendants, and awarded plaintiffs $25,000 in attorneys' fees. (App. 23a-26a) This order was never appealed. The order instructed defendants to attempt to agree among themselves on an allocation of the $25,000 fee award, but defendants did not do so.

The October 19th Order had stated that if the defendants were "unable to reach such agreement...the Court will make the allocation." (App. 26a) On March 13, 1980, Director DeVito moved the District Court to allocate fees. On June 24, 1980, the District Court ordered the Cook County defendants to pay $20,000 of the total fee award, and ordered Director DeVito to pay $5,000 of the fee award. Director DeVito appealed only from that portion of the order of June 24, 1980 that apportioned $5,000 of the attorneys' fees against him. The other defendants have not appealed from any order in this case.

The Court of Appeals, in an opinion by Judge Pell joined by Judges Bauer and Campbell, affirmed. The Court of Appeals held that the determination of a fees award is a factual one which rests in the sound discretion of the District Court (App. 31a); and that the District Court had properly determined that Director DeVito took specific actions in response to plaintiffs' lawsuit, both preceding the consent decree (App. 32a), and in the consent order itself. (App. 32a-33a) The Court of Appeals concluded that the facts supported the District Court's finding that respondents prevailed against Director DeVito, and recited in detail the specific facts which supported this conclusion. The court held that "the trial

court's apportionment clearly did not constitute an abuse of discretion" (App. 36a), and was supported by the record. (App. 37a)

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO LEGAL ISSUE JUSTIFYING REVIEW UNDER SUPREME COURT RULE 17.

Director DeVito's petition does not purport to meet the standards contained in Supreme Court Rule 17. There is no allegation of a conflict between federal courts of appeals, or between the decision of the court below and this court, and no such conflict in fact exists. Director DeVito implicitly tries to meet the standards of Rule 17 by constructing a question that he calls "important": whether the Court of Appeals properly applied a "per se rule of liability for attorneys' fees" based solely on his presence as a co-defendant. (Petition at 13) But the question he presents is a wholly fictional one: there is not a word, phrase or sentence in the Court of Appeals' opinion hinting at such a rule, and the attempt to mischaracterize the Court of Appeals' ruling cannot succeed merely by frequent reiteration of the imaginary "per se rule." (Petition at 8, 9, 10, 12, 13)

II. THE PETITION PRESENTS SOLELY A FACTUAL ISSUE THAT DOES NOT JUSTIFY REVIEW BY THIS COURT AND THAT WAS CORRECTLY DECIDED BY THE COURT OF APPEALS.

The actual issue presented is a factual one that has no relationship to the standards found in Supreme Court Rule 17 for granting the writ. That issue is whether the Court of Appeals was correct in finding that the District Court did not abuse its discretion in allocating 20 per cent of the fees liability to the petitioner, based on a finding of the propriety of such an allocation in relation to the relief obtained from the petitioner.

Thus, Director DeVito's real claim appears at page 9 of the Petition, where he asserts that the allocation "resuts from a failure

to correctly evaluate the benefits secured by the plaintiff class against the remedies provided by the various defendants...." While plaintiffs believe the "evaluat[ion]" was wholly correct, it was a factual determination and does not present a legal issue for review by this Court.

This Court determined the impropriety of plenary review of such an attorneys' fees evaluation in Maher v. Gagne, 448 U.S. 122 (1980). In Maher, this Court's holding concerned certain issues regarding the scope of 42 U.S.C. §1988. The additional question that the petitioner in Maher tried to present -- whether the relief in the consent decree was sufficient to sustain the fee award -- was not considered worthy of full review by the Court:

> Nor can we accept petitioner's contention that respondent did not gain sufficient relief through the consent decree to be considered the prevailing party. The District Court's contrary finding was based on its familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation stages. That finding was upheld by the Court of Appeals, and we see no reason to question its validity. See Graver Mfg. Co. v. Linde Co., 336 US 271, 275, 93 L Ed 672, 69 S Ct 535.

448 U.S. at 129-130.*/

The cited case, Graver Mfg. Co., discussing F.R.C.P. 52(a), stated:

> The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of

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*/ The award of attorneys' fees under 42 U.S.C. §1988 is a matter within the discretion of the trial court. The reasonableness of the award (in this case, the apportionment) cannot be disturbed on appeal absent a showing of abuse of discretion. Konczak v. Tyrrell, 603 F.2d 13, 19 (7th Cir. 1979), cert. denied 100 S.Ct. 668 (1980); Johnson v. Georgia Highway Express, 488 F.2d 714, 720 (5th Cir. 1974). The standard for abuse of discretion applied here was a typical one:

> Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Particle Data Laboratories, Inc. v. Coulter Electronics, Inc., 420 F.2d 1174, 1178 (7th Cir. 1969). [Citation omitted] App. 36a.

> conflicting testimony and reverse only "clearly erroneous" findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence.... A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of error. [Citations omitted]

336 U.S. at 275.

In this case, the Court of Appeals correctly enunciated these priciples (App. 36a) and applied the principles in a thorough manner. It correctly found that Director DeVito failed to meet his heavy burden to overturn the district court's exercise of discretion in apportioning $5000 attorneys' fees against him. The district court had exercised its discretion on the basis of its "familiarity with the progress of the litigation through the pleading, discovery, and settlement negotiation states." Maher v. Gagne, supra, 448 U.S. at 130.

Because of this familiarity, the district court was in the best position to judge the proper apportionment of the fees. The district court assessed 20 per cent of the fee award against Director DeVito because of its knowledge of Director DeVito's actions throughout the litigation, including: his role in the grant program and start-up program; his role in the consent order and monitoring subsequent to that order; and his involvement in and joint responsibility for the conditions at the jail that necessitated such relief. The court found that "plaintiffs have prevailed as to all of the parties defendant, each of whom had a role and a responsibility in the area of providing adequate mental health care." (App. 26a)*/

*/ Director DeVito states in his "Question Presented" that he provided none of the relief to plaintiffs-respondents. The order finding otherwise, quoted in the text, was entered on October 19, 1979. Director DeVito did not appeal this order. It was seven months later (June 24, 1980) that the district court apportioned the fees and Director DeVito appealed. Petitioner's assumption that he thus preserved the issue of whether or not plaintiffs prevailed against him without his ever having appealed the October 19, 1979 order that found him liable is, at least, questionable. The Court of Appeals found it unnecessary to reach the issue in light of its disposition of the abuse of discretion issue. App. 30a-31a n.1.

Although other defendants in the suit played greater roles in providing relief to plaintiffs, nevertheless, Director DeVito played an essential role in the provision of relief:

1) Five months after the case was filed, he developed and implemented a start-up plan for the provision of mental health services to pre-trial detainees; that plan became the basis for the final consent order in the case.

2) He has funded half of the mental health program since the initial plan, allocating hundreds of thousands of dollars to meet the allegations of the complaint.

3) He monitored the provision of mental health care at the Department of Corrections before the consent order was signed.

4) He paid the fees of the expert panel appointed by the court by agreement of the parties to evaluate the mental health program at the Cook County Department of Corrections.

5) He has filed reports to the court pursuant to the consent decree disclosing continued financial support of the mental health program and monitoring the work of that program.

The result of this lawsuit is that Director DeVito has been and is effectively monitoring and funding a substantial proportion of the mental health program for pre-trial detainees in Cook County. The Agreed Order, however, relates principally to the constituent obligations of county personnel. That is the necessary result of a "structural" decree detailing the obligations of the people actually carrying out the relief on a daily basis -- e.g., county jail guards and doctors. It does not detract from the substantial result of the lawsuit: making Defendant DeVito a key participant

in the overall creation and provision of mental health care at the jail. There is more than adequate evidence to justify the Court of Appeals' conclusion: "we view the evidence of the Department's participation as a whole in this case as supporting a conclusion that the Department did take certain steps to alleviate deficiencies in mental health treatment of pre-trial detainees as a result of the plaintiffs' lawsuit." (App. 33a) */

CONCLUSION

The petition for a writ of certiorari is wholly without merit, does not meet the standards of Supreme Court Rule 17, and the writ should be denied. No important issues are raised, and the

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*/ Petitioner's Question Presented also notes that there was no "finding that any federal law was violated and [no] admission of liability." See also Petition at 9. The relevance of this is not explained, and the Petition itself does not explain how Director DeVito would have this Court address the issue. Indeed, the Petition elsewhere states, correctly, that

> neither formal judicial relief, nor a finding of illegal conduct on defendants' part, are preconditions to an award of attorneys' fees. An award may be appropriate where plaintiff had vindicated rights through a consent judgment. [Senate Report 94-1011, 94th Cong., 2nd Session at p. 5] Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

Petition at 10.

A Consent Decree normally precludes court consideration of the merits of the claim and has the parties disclaiming any admission of liability. This case precisely parallels Maher v. Gagne in this respect:

> respondent did allege violations of her Fourteenth Amendment due process and equal protection rights, which the District Court and the Court of Appeals both held to be sufficiently substantial to support federal jurisdiction under Hagans v. Lavine, 415 U.S. 528, 39 L Ed 2d 577, 94 S Ct 1372. Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree.

448 U.S. 122, 130-131 (1980).

Once such a substantial constitutional claim is presented, if the case is settled, policies counseling the avoidance of unnecessary judicial determinations of constitutional issues come into play. See Maher v. Gagne, supra, 448 U.S. at 130-133; Hagans v. Lavine, 415 U.S. 528 (1974). Thus, unless the constitutional claim is "frivolous or so insubstantial as to be beyond the jurisdiction of the District Court," Hagans v. Lavine, supra, 415 U.S. at 539, the court should not look behind the consent decree to review the merits of the Constitutional claim to determine fees liability. Director DeVito has never suggested that plaintiffs' claim did not meet the Hagans standard, and does not do so now. Both the district court and the Court of Appeals found the claim far from frivolous. (App. at 35a)

case is limited to its facts. Petitioners have misstated the facts in their statement of the issue, the issue that they do present is wholly factual and was decided properly and best by the District Court and correctly affirmed by the Seventh Circuit.

Respectfully submitted,

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PLEASE TAKE NOTICE that on Tuesday, February 2, 1982, I filed with the Clerk of the Supreme Court of the United States the attached "Respondents' Brief in Opposition to Petition for Certiorari," and "Motion for Leave to Proceed In Forma Pauperis."

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CERTIFICATE OF SERVICE

I, Sally T. Elson, hereby state that I caused to be served the above-listed documents on the individuals above named, at the addresses listed above, first-class mail, postage prepaid in the postal service box at 343 S. Dearborn, Chicago, IL at 10:00 a.m., this 3rd day of February, 1982.